Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO A-02-2 OF 1994
SHAIK DAUD, GOPAL SRI RAM AND VC GEORGE JJCA
13 FEBRUARY 1995, 13 JANUARY 1995

Civil Procedure *— Summary possession of land — Whether application was made under O 89 — Whether summary procedure proper as defendant was tenant holding over — Rules of the High Court 1980 O 89*

Civil Procedure *— Originating summons — Conversion to writ — Failure of judge to give directions as to pleadings and conduct of proceedings — Whether provisions under O 18 as to time for filing pleadings automatically apply — Whether plaintiff could obtain judgment in default — Rules of the High Court 1980 O 18 & O 28 r 8(1)*

Civil Procedure *— Judgment — Default of defence — Setting aside — Whether judgment regular — Amount obtained more than amount claimed in statement of claim — Unliquidated demand — Whether could be construed as liquidated demand if definite sum stated — Rules of the High Court 1980 O 19*

Civil Procedure *— Originating summons — Summary possession of land — Title of summons — Failure to state rule under which application is brought — Effect — Rules of the High Court 1980 O 89*

Civil Procedure *— Appeal — Court of Appeal — Whether by way of rehearing — Whether court can consider issues not raised in grounds of appeal — Rules of the Court of Appeal 1994 rr 5(1) & 18(2)*

The respondent took out an originating summons claiming, inter alia, vacant possession of certain premises ('the property') and damages for unlawful occupation. The Order under which the originating summons was brought was not specified on the summons. The appellant applied to strike out the summons on the ground, inter alia, that he was a tenant holding over. The appellant contended that the respondent's application was made under O 89 of the Rules of the High Court 1980 ('the RHC') and since the respondent had, in his affidavit, admitted that the appellant was a tenant holding over, the summary procedure under O 89 was not applicable. The respondent, however, denied that his application was made under O 89 since it also claimed for reliefs other than vacant possession and contended that it was in fact made under O 28.

The High Court judge exercised his discretion under O 28 r 8(1) and ordered the matter to proceed as if commenced by writ ('the conversion order') and ordered the respondent to deliver a statement of claim within 14 days from 29 January 1994. However, there was no record in the notes of evidence of a corresponding order requiring the appellant to enter his defence. The appellant's solicitors wrote to the defendant's solicitors enquiring whether they were agreeable to

the defence being filed only after the appellant's appeal to the Supreme Court was heard but the plaintiff's solicitors did not agree. The appellant's appeal to the Supreme Court against the judge's order was dismissed on 11 October 1994. In the meantime, the respondent delivered his statement of claim on 14 February 1994. On 10 March 1994, the appellant filed a summons to stay all proceedings including filing of the defence pending his appeal but, before it was heard, the respondent entered judgment in default of defence on 21 March 1994. The registrar sealed and issued the judgment filed by the respondent although aware of the appellant's stand on the issue of the time for filing the defence. The appellant then took out another summons to set aside the default judgment. The judge dismissed the application on the grounds, inter alia, that the default judgment was regular and there was no defence on the merits, but granted an interim stay pending this appeal. In the appeal, the appellant submitted, inter alia, that the award of damages of RM15,000 per month from 1 June 1993 until delivery of vacant possession was more than what had been claimed.

Held, allowing the appeal and ordering the appellant to file his defence within 14 days of the date of judgment:

(1) (Per **Shaik Daud JCA**) In order to determine what an application is all about, the court should look at the substance of the application. In this case, it was clear that the originating summons was one under O 89.

(2) (Per **Shaik Daud JCA**) When a judge directs conversion under O 28 r 8(1), he is required to give specific directions as to pleadings and the conduct of the proceedings from then on. Since the judge did not give such directions to the defence, the appellant's failure to file the defence did not entitle the respondent to take advantage of the provisions of O 19. Furthermore, as the respondent had defaulted by filing his statement of claim 16 days later and not within 14 days as directed, he should not be allowed to take advantage of the appellant's default, if any.

(3) (Per **Shaik Daud JCA**) A judgment would be deemed irregular if it was taken for more than what was due. In this case, the terms of the default judgment were different from the prayers in the statement of claim and the damages obtained were more than the amounts prayed for. Therefore, the default judgment was irregular and the appellant was entitled to have it set aside ex debito justitiae.

Case referred to

Evans v Bartlam [1937] AC 473; [1937] 2 All ER 646 (folld)

(4) (Per **Gopal Sri Ram JCA**) Where an order for conversion is made under O 28 r 8(1), the provisions of O 18 are not

automatically attracted. The judge must give specific directions about the future conduct of the action.

(5) (Per **Gopal Sri Ram JCA**) An originating process requiring an intitulement must state, with sufficient particularity, either in its heading or in its body, the statute or rule of court under which the court is being moved, otherwise it would be an embarrassing pleading and liable to be struck out, unless sooner amended.

(6) (Per **Gopal Sri Ram JCA**) Despite misgivings as to the correctness of the conversion order, the appellant could not complain that the judgment was irregular on the ground of non-observance of the mandatory provisions of O 89 because the conversion order had converted the entire proceedings into an ordinary action for possession.

(7) (Per **Gopal Sri Ram JCA**) However, it is an established principle that in monetary claims, the amount for which judgment is entered must be limited to the amount actually due, while in non-monetary claims, judgment should be entered for the precise relief claimed. Here, the default judgment for damages which were more than what was due for unlawful occupation was irregular and the judgment in regard to delivery of vacant possession was prematurely obtained. Therefore, the judgment should be killed in its entirety and set aside ex debito justitiae.

Cases referred to

Armitage v Parsons [1908] 2 KB 410 (refd)
Ban Hin Lee Bank Bhd v Somali Bank (*The Independent*, 28 November 1988) (refd)
Eyles v Wells (1991) (unreported) (CA transcript 376) (not folld)
Harkness v Bell's Asbestos & Engineering Ltd [1967] 2 QB 729; [1966] 3 All ER 843; [1967] 2 WLR 29 (refd)
Hughes v Justin [1894] 1 QB 667 (refd)
Leow Boke Chooi v Asia Motor Co Ltd [1967] 2 MLJ 109 (refd)
Metroinvest Ansalt v Commercial Union Assurance Co Ltd [1985] 2 All ER 318; [1985] 1 WLR 513 (refd)
Muir v Jenks [1913] 2 KB 412 (refd)
Ong Yok Chu v Yong Teck Fong [1960] MLJ 292 (refd)
Orpen Road (9), Stoke Newington, Re [1971] 1 All ER 944; [1971] 1 WLR 166 (refd)
Sunkyong International Inc v Malaysian Rubber Development Corp Bhd [1992] 2 MLJ 146 (refd)
Yap Hong Thin v Seenevasam [1970] 1 MLJ 143 (refd)

(8) (Per **VC George JCA**) The times prescribed by O 18 for delivery of pleadings had no application here since the proceedings had not been commenced as a writ action.

(9) (Per **VC George JCA**) As the respondent was himself out of time, he had to apply to court under O 3 r 5 for an extension of time unless there was a consent in writing by the appellant. The record did not show that there was any such extension or consent.

(10) (Per **VC George JCA**) Rule 5(1) of the Rules of the Court of Appeal 1994 provides that appeals to the court shall be by way of rehearing and r 18(2) provides that the Court of Appeal in deciding the appeal shall not be confined to the grounds set out by the appellant. In this appeal, although the grounds of appeal did not include a complaint that in fact there was no default by the appellant in filing its defence, the court was conferred with the power to make orders that the justice of the matter called for.

(11) (Per **VC George JCA**) Order 19 r 3 of the RHC provides that the plaintiff is entitled to enter interlocutory judgment for damages to be assessed upon the defendant's default where the claim is for unliquidated damages only. The damages claimed could not be construed as a debt or liquidated demand as the words 'debt or liquidated demand' do not extend to unliquidated damages whether in tort or in contract even though the amount of damages be named at a definite figure. Therefore, it was highly questionable for the registrar to enter a definite amount by way of damages without having it assessed and to enter judgment at RM15,000 a month from 1 June 1993 when there was no nexus between that amount and that date.

Cases referred to

A-G v Simpson [1901] 2 Ch 671 (folld)
Anlaby v Praetorius (1888) 20 QBD 764 (folld)
Doyle v Olby (Ironmongers) Ltd [1969] 2 QB 158; [1969] 2 All ER 119 (folld)
Hughes v Justin [1894] 1 QB 667 (folld)
Knight v Abbot Page & Co (1882) 10 QBD 11 (refd)
Lee Hock Ning v Government of Malaysia [1972] 2 MLJ 12 (folld)
Purnell v Great Western Railway Co and Harris (1876) 1 QBD 636 (folld)
Wong Lai Fatt v PP [1973] 2 MLJ 31 (folld)

Obiter:

(1) (Per **Gopal Sri Ram JCA**) In view of the circumstances of the case, the registrar should have returned the judgment form to the plaintiff without sealing it, accompanied with a request that the plaintiff re-present it after the disposal of the defendant's summons. He should have then assigned the earliest available hearing date to the defendant's summons for a stay.

(2) (Per **Gopal Sri Ram JCA**) Although the respondent submitted that the admission in his affidavit that he had invoked the summary procedure under O 89 was an erroneous admission of law and therefore not binding on him, the concession left the distinct impression that the summary jurisdiction was indeed being invoked. Under such circumstances, it may amount to a miscarriage of justice to allow the respondent to resile from the impression created but not corrected at first opportunity.

(3) (Per **Gopal Sri Ram JCA**) I am uncertain whether a judge is entitled to, and, more importantly, whether he should, act under O 28 r 8(1) and direct proceedings commenced by originating summons under O 89 to be continued as though they were commenced by writ.

(4) (Per **VC George JCA**) Care must be taken not to sign default judgment before due time (if any) has expired and also to enter default judgment only for the amount actually due at the time when judgment is entered or the defendant will be entitled ex debito justitiae to have it set aside.

[Bahasa Malaysia summary

Responden telah mengeluarkan saman pemula untuk menuntut, antara lain, milikan kosong sesuatu premis tertentu ('harta itu') dan ganti rugi untuk penghunian menyalahi undang-undang. Aturan di bawah mana saman pemula itu dibawa tidak dinyatakan di atas saman itu. Perayu memohon untuk membatalkan saman itu atas alasan, antara lain, bahawa dia adalah seorang penyewa yang sedang memegang lepas masa. Perayu menegaskan bahawa permohonan responden dibuat di bawah A 89 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan memandangkan responden telah, dalam afidavit beliau, mengaku bahawa perayu adalah penyewa yang memegang lepas masa, prosedur terus di bawah A 89 tidak terpakai. Responden, walau bagaimanapun, menafikan bahawa permohonannya dibuat di bawah A 89 memandangkan dia juga menuntut relief selain daripada milikan kosong dan menegaskan bahawa ia pada hakikatnya telah dibuat di bawah A 28.

Hakim Mahkamah Tinggi telah menggunakan budi bicaranya di bawah A 28 k 8(1) dan mengarahkan supaya kes ini diteruskan seperti ia dimulakan dengan writ ('perintah penukaran itu') dan mengarahkan responden supaya menyerahkan satu pernyataan tuntutan dalam tempoh 14 hari dari tarikh 29 Januari 1994. Walau bagaimanapun, tidak terdapat rekod dalam nota keterangan mengenai satu arahan yang sepadan yang memerlukan perayu membuat plinya. Peguamcara perayu telah menulis kepada peguamcara responden untuk menanya sama ada mereka bersetuju supaya pembelaan difailkan hanya selepas rayuan perayu ke Mahkamah Agung didengar tetapi peguamcara responden tidak bersetuju. Rayuan perayu ke Mahkamah Agung terhadap perintah hakim tersebut telah ditolak

pada 11 Oktober 1994. Sementara itu, responden telah menyerahkan pernyataan tuntutannya pada 14 Februari 1994. Pada 10 Mac 1994, perayu telah memfailkan suatu saman untuk penggantungan segala prosiding termasuk memfailkan pembelaannya sementara menunggu rayuan, tetapi sebelum ia didengar, responden telah mendapatkan penghakiman ingkar pembelaan pada 21 Mac 1994. Pendaftar mahkamah telah memeterai dan mengeluarkan penghakiman yang difailkan oleh responden walaupun beliau sedar akan pendirian yang diambil oleh perayu atas isu tentang masa untuk memfailkan pembelaannya. Perayu kemudiannya telah mengeluarkan satu lagi saman untuk mengetepikan penghakiman ingkar itu. Hakim tersebut telah mengetepikan permohonan itu atas alasan, antara lain, bahawa penghakiman ingkar itu adalah suatu penghakiman mengikut aturan dan tiada pembelaan yang bermerit, tetapi membenarkan penggantungan interim sementara menunggu rayuan ini. Di dalam rayuan ini, perayu berhujah, antara lain, bahawa award ganti rugi sebanyak RM15,000 sebulan dari 1 Jun 1993 hingga milikan kosong diberikan adalah lebih daripada apa yang dituntut.

Diputuskan, membenarkan rayuan tersebut dan memerintahkan perayu memfailkan pembelaan beliau dalam tempoh 14 hari dari tarikh penghakiman:

(1) (Oleh **Shaik Daud HMR**) Bagi menentukan apa yang dipohon di dalam sesuatu permohonan, mahkamah harus meneliti isi kandungan permohonan itu. Dalam kes ini, adalah jelas bahawa saman pemula tersebut adalah suatu saman di bawah A 89.

(2) (Oleh **Shaik Daud HMR**) Apabila seseorang hakim mengarahkan penukaran di bawah A 28 k 8(1), beliau dikehendaki memberi arahan spesifik mengenai pliding dan pengendalian prosiding seterusnya. Oleh sebab hakim tersebut telah tidak memberikan arahan sedemikian kepada pihak pembela, kegagalan perayu untuk memfailkan pembelaannya tidak memberi hak kepada responden untuk mengambil kesempatan daripada peruntukan A 19. Lebih-lebih lagi, walaupun responden diarah memfailkan pernyataan tuntutannya dalam tempoh 14 hari, dia hanya memfailkannya 16 hari kemudian. Oleh kerana beliau sendiri telah ingkar, beliau tidak harus dibenarkan mengambil kesempatan daripada keingkaran perayu, sekiranya ada.

(3) (Oleh **Shaik Daud HMR**) Sesuatu penghakiman itu akan dianggap luar aturan sekiranya ia dikeluarkan untuk menuntut jumlah yang lebih daripada apa yang kena dibayar. Dalam kes ini, terma penghakiman ingkar itu berbeza daripada apa yang dipohon di dalam pernyataan tuntutan dan ganti rugi yang diperolehi itu melebihi jumlah yang dipohon. Oleh yang demikian, penghakiman ingkar itu adalah luar aturan dan perayu berhak mengetepikannya ex debito justitiae.

(4) (Oleh **Gopal Sri Ram JCA**) Di mana suatu perintah untuk penukaran dibuat di bawah A 28 k 8(1), peruntukan A 18 tidak terpakai secara automatik. Hakim mesti memberi arahan spesifik tentang cara pengendalian tindakan itu seterusnya.

(5) (Oleh **Gopal Sri Ram JCA**) Sesuatu proses pemula yang memerlukan suatu tajuk mesti menyatakan, dengan butir-butir yang mencukupi, sama ada di dalam tajuk atau kandungannya, statut atau kaedah di bawah mana permohonan itu dibawa ke mahkamah, kalau tidak ia akan merupakan suatu pliding yang menjadi penghalang dan boleh dibatalkan kecuali jika ia dipinda terlebih dahulu.

(6) (Oleh **Gopal Sri Ram JCA**) Walaupun mempunyai keraguan tentang ketepatan perintah penukaran itu, perayu tidak boleh mengadu bahawa penghakiman itu adalah luar aturan disebabkan ketidakpatuhan dengan peruntukan mandatori A 89 kerana perintah penukaran itu telah menukarkan keseluruhan prosiding itu kepada suatu tindakan biasa untuk mendapatkan milikan.

(7) (Oleh **Gopal Sri Ram JCA**) Bagaimanapun, adalah menjadi suatu prinsip mantap bahawa di dalam tuntutan kewangan, jumlah yang diberikan di dalam penghakiman mesti dihadkan kepada jumlah yang sebenarnya kena dibayar, sementara di dalam tuntutan bukan kewangan, penghakiman seharusnya dimasukkan untuk relief tertentu yang dituntut. Di sini, penghakiman ingkar untuk ganti rugi yang melebihi jumlah yang sebenarnya kena dibayar untuk penghunian menyalahi undang-undang itu adalah luar aturan dan penghakiman berkenaan dengan penyerahan milikan kosong itu telah diperolehi sebelum masa. Oleh itu, penghakiman itu sepatutnya dibatalkan pada keseluruhannya dan diketepikan ex debito justitiae.

(8) (Oleh **VC George JCA**) Tempoh yang ditetapkan oleh A 18 untuk menyerahkan pliding tidak terpakai di sini kerana prosiding tersebut tidak dimulakan sebagai suatu tindakan writ.

(9) (Oleh **VC George JCA**) Oleh kerana responden sendiri tidak mengikut masa yang ditetapkan, beliau terpaksa memohon kepada mahkamah di bawah A 3 k 5 untuk suatu perlanjutan masa kecuali jika terdapat persetujuan bertulis daripada perayu. Nota-nota tidak menunjukkan bahawa terdapat perlanjutan masa atau persetujuan sedemikian.

(10) (Oleh **VC George JCA**) Kaedah 5(1) Kaedah-Kedah Mahkamah Rayuan 1994 memperuntukkan bahawa rayuan kepada mahkamah mesti dijalankan sebagai perbicaraan semula dan k 18(2) memperuntukkan bahawa Mahkamah Rayuan apabila memutuskan sesuatu rayuan itu tidak terhad kepada alasan yang dikemukakan oleh perayu. Di dalam rayuan ini, walaupun alasan rayuan tidak mengandungi aduan bahawa pada hakikatnya tidak terdapat keingkaran oleh perayu dalam memfailkan

pembelaannya, mahkamah diberikan kuasa untuk membuat perintah yang perlu dibuat untuk mencapai keadilan. A

(11) (Oleh **VC George JCA**) Aturan 19 k 3 KMT memperuntukkan bahawa seorang plaintif berhak mencatatkan penghakiman interlokutori untuk ganti rugi yang akan ditaksirkan apabila defendan ingkar, di mana tuntutan itu hanya untuk ganti rugi jumlah tidak tertentu. Ganti rugi yang dituntut itu tidak boleh disifatkan sebagai suatu hutang atau tuntutan jumlah tertentu kerana perkataan-perkataan 'hutang atau tuntutan jumlah tertentu' tidak termasuk ganti rugi jumlah tidak tertentu sama ada mengikut tort atau kontrak walaupun jumlah ganti rugi itu dinyatakan sebagai suatu jumlah tertentu. Oleh itu, pencatatan penghakiman oleh pendaftar untuk suatu jumlah tertentu sebagai ganti rugi tanpa mengadakan pentaksiran dan pencatatan penghakiman untuk RM15,000 sebulan dari 1 Jun 1993 apabila tidak ada perhubungan di antara jumlah dan tarikh itu, boleh dipersoalkan. B C D

Obiter:

(1) (Oleh **Gopal Sri Ram JCA**) Memandangkan keadaan kes ini, pendaftar seharusnya memulangkan borang penghakiman kepada plaintif tanpa memeteraikannya, bersama suatu permintaan supaya plaintif mengemukakannya semula selepas penentuan saman defendan. Kemudiannya beliau sepatutnya memberikan tarikh pendengaran yang terawal mungkin untuk mendengar saman defendan yang memohon suatu penggantungan. E

(2) (Oleh **Gopal Sri Ram JCA**) Walaupun responden berhujah bahawa pengakuan di dalam afidavit beliau yang beliau telah menggunakan prosedur terus di bawah A 89 itu merupakan suatu pengakuan tentang undang-undang yang salah dan oleh itu tidak mengikat beliau, pengakuan itu memberikan tanggapan jelas bahawa bidang kuasa terus itu memang digunakan. Di dalam keadaan sedemikian, ia mungkin merupakan suatu salah laksana keadilan untuk membenarkan responden menarik balik tanggapan yang diberikan itu dan yang tidak dibetulkan sebaik sahaja ada peluang untuk berbuat demikian. F G

(3) (Oleh **Gopal Sri Ram JCA**) Saya tidak pasti sama ada seseorang hakim berhak, dan lebih penting lagi, sama ada beliau patut, bertindak di bawah A 28 k 8(1) dan mengarahkan supaya prosiding yang dimulakan di bawah A 89 diteruskan seperti dimulakan melalui writ. H

(4) (Oleh **VC George JCA**) Perhatian berat mesti diambil supaya tidak memasukkan penghakiman ingkar sebelum masanya yang wajar (jika ada) telah luput dan juga untuk memasukkan penghakiman ingkar hanya untuk jumlah yang sebenarnya kena dibayar pada ketika penghakiman itu dicatatkan, kerana jika tidak, defendan berhak mengetepikannya ex debito justitiae.] I

[*Editorial Note*: The respondent has filed a motion for leave to appeal to the Federal Court.]

Notes

For cases on judgments in default of defence, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1897–1903, 1976, 1981, 1985, 1987, 1997 and 1999.

For cases on summary possession of land, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 3521–3525.

Complete list of cases referred to

A-G v Simpson [1901] 2 Ch 671
Anlaby v Praetorius (1888) 20 QBD 764
Armitage v Parsons [1908] 2 KB 410
Ban Hin Lee Bank Bhd v Somali Bank (*The Independent*, 28 November 1988)
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Evans v Bartlam [1937] AC 473; [1937] 2 All ER 646
Eyles v Wells (1991) (unreported) (CA transcript 376)
Harkness v Bell's Asbestos & Engineering Ltd [1967] 2 QB 729; [1966] 3 All ER 843; [1967] 2 WLR 29
Hughes v Justin [1894] 1 QB 667
Knight v Abbot Page & Co (1882) 10 QBD 11
Lee Hock Ning v Government of Malaysia [1972] 2 MLJ 12
Leow Boke Chooi v Asia Motor Co Ltd [1967] 2 MLJ 109
Metroinvest Ansalt v Commercial Union Assurance Co Ltd [1985] 2 All ER 318; [1985] 1 WLR 513
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Ong Yok Chu v Yong Teck Fong [1960] MLJ 292
Orpen Road (9), Stoke Newington, Re [1971] 1 All ER 944; [1971] 1 WLR 166
Purnell v Great Western Railway Co and Harris (1876) 1 QBD 636
Sunkyong International Inc v Malaysian Rubber Development Corp Bhd [1992] 2 MLJ 146
Wong Lai Fatt v PP [1973] 2 MLJ 31
Yap Hong Thin v Seenevasam [1970] 1 MLJ 143

Legislation referred to

Public Authorities Protection Ordinance 1948 s 2
Rules of the Court of Appeal 1994 rr 5(1), 7(4), (5), 18(1), (2)
Rules of the High Court 1980 O 2 r 1(1), (2), O 3 r 5, O 18, O 19 rr 3, 5(1), O 28 r 8(1), (2), O 89
Rules of Supreme Court Order LVIII r 10(3), (4), O 59 r 10, O 113 [Eng]

Appeal from: Originating Summons No 24–638–93 (High Court, Ipoh)

Tan Phock Kin (*Thillaimuthu & Phock Kin*) for the appellant. A
Gurubachan Singh (*Bachan & Kartar*) for the respondent.

Cur Adv Vult

Shaik Daud JCA: This is an appeal from the decision of Ong See Seng J who had on 24 June 1994 ruled that a default judgment entered on 2 March 1994 against the appellant is a regular judgment and he accordingly dismissed an application by the appellant to have it set aside. B

The facts of the case are that on 5 August 1993, the respondent took out an originating summons claiming vacant possession (purportedly under O 89 of the Rules of the High Court 1980) of premises No 88, 90 and 92 C Jalan CM Yusoff, Ipoh, Perak. He also applied for other relief including a permanent injunction restraining the appellant from trespassing onto the property. On 14 August 1993, the appellant entered a conditional appearance and, on 25 August 1993, took out a summons to strike out the originating summons, on the grounds, inter alia, that he was a tenant D holding over. He contends that the respondent in his affidavit also admitted that the appellant was a tenant holding over and therefore the summary provision under O 89 is not applicable. The respondent is of the view that the originating summons is not under O 89 since it also claims for other reliefs apart from vacant possession. He contends that in fact it is an application for vacant possession under O 28. After hearing submissions, E the learned judge directed that the matter be proceeded with as if commenced by a writ and ordered the respondent to deliver a statement of claim within 14 days. On record there was, however, no corresponding order requiring the appellant to plead. The appellant not being satisfied with the decision appealed to the then Supreme Court and the appeal has F since been heard and dismissed by the Federal Court on 11 October 1994.

Accordingly, the respondent delivered his pleading on 14 February 1994. The appellant, in correspondence, requested the respondent for an extension of time to deliver his defence, pending the outcome of his appeal. The respondent refused the request and informed the appellant G that judgment in default of defence would be entered. On 10 March 1994, the appellant filed a summons to stay all proceedings including filing of the defence and that summons was scheduled for hearing on 13 May 1994 but before it was heard the respondent, on 21 March 1994, entered judgment in default. The appellant then took out another summons to set aside the default judgment. The application was heard on 24 June 1994 and dismissed H but the learned judge, however, granted an interim stay. Hence this appeal.

Unfortunately, the learned judge did not give a written judgment but gleaning from the notes of evidence, his ruling states that since the judgment was a regular judgment and no defence on merits had been disclosed in the I affidavit, he therefore dismissed the application.

At the outset of this matter, both in the High Court and at the appeal, there was a dispute as to whether the originating summons was one

A under O 89. The appellant contends that it is an application under O 89 while the respondent contends that it is not. I think in order to determine what an application is all about, the court should look at the substance of the application.

On my perusal of the substance of this originating summons, it seems B clear to me that the originating summons, although it did not mention in so many words, is one under O 89. Otherwise there would be no reason for it to be filed as an originating summons. If, as is contended by learned counsel for the respondent, it was an action for recovery of vacant possession, then I see no earthly reason why he did not issue a writ to begin with. I am equally sure that the learned judge was also of the same view that it was an C application under O 89. Therefore, he alluded to the provisions of O 28 r 8(1). This rule empowers the court to convert an originating summons as if it was begun by a writ, without having to direct the applicant to file a fresh writ. The learned judge's ruling has in fact converted it into a writ and he had also directed the respondent to file a statement of claim within D 14 days.

Arising from this, another dispute appears to have surfaced. It is the submission of learned counsel for the respondent that the learned judge also directed the defence to be filed within 14 days after being served with the statement of claim while learned counsel for the appellant submits that there was no such ruling. As I said earlier, the notes of evidence do not E reflect that there was such a ruling. Not being the trial court, as far as this court is concerned, it has to rely on the learned judge's notes of evidence, and the notes make no such mention. Since he recorded the direction vis-à-vis the respondent, I simply cannot fathom why he did not record the same vis-à-vis the defence. The only inference I can arrive at is that he did F not make such a direction. Learned counsel for the respondent quickly points out that the court's order dated 21 March 1994 which has been perfected itself shows that such a ruling was made. Hence, he says his contention must be right. With respect, I cannot accept this. What appears in the court's order is in fact a creature of the respondent and the appellant has no knowledge of this. This order was submitted by the respondent G after having obtained the default judgment and the appellant would not have seen the draft copy of it before it was issued. On my further perusal of the court's order it seems clear that no such direction was made because the order, in its second paragraph says that the defence not having been filed as required by the Rules of the High Court 1980, and not contrary to H the learned judge's direction.

Apart from this, it was also brought to the attention of the court a letter dated 23 February 1994 from the appellant's solicitors to the respondent's solicitors wherein the appellant requested for an extension of time to file the defence until after the decision of the appeal in the I Supreme Court then. As for me I do not think that this letter ought to be interpreted that the learned judge in fact made the aforesaid direction. My reading of this letter is that it says nothing more than that it simply request for time to file the defence until after the decision of the appeal.

As stated earlier, since there is no mention of this direction in the notes of evidence, and for the reasons I mentioned earlier I would say that no such direction was made.

I think what the learned counsel is trying to tell this court is that the learned judge made the conversion ruling then it is understood that the time expressly provided for delivering of pleadings under O 18 automatically takes over. In an action commenced by writ, the time for various pleadings to be delivered is expressly provided by O 18. Therefore, since the defence defied this provision by not filing the defence within time, he contends that the respondent is entitled to seek a judgment by default.

I do not agree that the provisions of O 18 are automatically attracted in this case. It is my view that although in an action begun by writ the provisions of O 18 must be followed, it does not follow that the provisions of O 18 are automatically attracted when the court orders a conversion under O 28 r 8(1). If that is the case then r 8 would have mentioned so. I am of the view that when a judge directs conversion under O 28 r 8(1), he is required to give specific directions as to pleadings and the conduct of the proceedings then on. Since I hold that the learned judge did not give such directions to the defence, I would also hold that the failure of the appellant to file the defence has not resulted in the default of the defence which entitled the respondent to take advantage of the provisions of O 19. On my perusal of the chronology of events, I found another reason why the respondent is not entitled to take advantage of O 19. This appears to have escaped learned counsel for appellant since he never raised it in submission. The respondent was on 29 January 1994 directed to file his statement of claim within 14 days from that date but he only filed it on 14 February 1994, which is some 16 days later. He himself has defaulted, therefore, he should not be allowed to take advantage of the defence's default, if at all it is a default, but as stated above the defence is not in default.

In spite of all these, learned counsel for the appellant, I think, is on slightly solid ground when he submits that the default judgement is an irregular judgement and therefore ought to be set aside ex debito justitiae. For myself, I would agree that this is a crucial issue in this appeal as this was the finding of the learned judge.

Now the court always has the power to set aside a default judgment is good and enforceable unless set aside. The basis for this discretion is stated by Lord Atkin in the leading case of *Evans v Bartlam* [1937] AC 473 at p 480; [1937] 2 All ER 646 at p 650:

> The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.

Learned counsel for the appellant contends that as the default judgment is irregular, it ought to be set aside and there was no necessity for the appellant to show a defence on the merits.

A Now a judgment would be deemed to be irregular if it was taken for an amount more than what is due. I would refer to *Mallal's Supreme Court Practice* (2nd Ed) para 19/2/6 at p 232 which states:

> If a judgment is entered for an amount which exceeds that claimed in the action or which fails to take into account payments received by the plaintiff
B to the credit of the defendant between the commencement of the action and the time when judgment is entered, in other words, for a sum exceeding that actually due at the time judgment is entered, the defendant will also be entitled ex debito justitiae to have the judgment set aside.

Learned counsel for the appellant submits that the respondent's statement
C of claim prays for the following:

(a) vacant possession;

(b) damages based on market rental at RM12,000 per month from 1 June 1993 until 30 September 1993;

(c) damages based on market rental at RM15,000 per month from
D 1 October 1993 until a date to be fixed by court; and

(d) market rental from the period to be fixed by the court until surrender of vacant possession.

The default judgment taken by the respondent appears to be in terms different from the prayers in the statement of claim. The default judgment
E taken shows that damages based on market rental to be at RM15,000 per month from 1 June 1993 until delivery of vacant possession. The statement of claim prays for RM15,000 per month from 1 October 1993 whereas the judgment taken states from 1 June 1993. The prayers stipulate that damages are to be payable until a date to be fixed by the court whereas the default
F judgment taken provides for damages to be from 1 June 1993 until delivery of vacant possession.

On my perusal of the prayers in the statement of claim and the default judgment taken, I agree with the submission of the learned counsel for the appellant. The default judgment did not appear to reflect what was prayed for by the plaintiff in his statement of claim. With the default
G judgment the respondent is in fact getting more than what he prayed for. Once this is shown to be the case the judgment cannot be said to be a regular judgment. Therefore, I hold that the default judgment taken by the respondent is an irregular judgment and ought not to be allowed to subsist. That being the case, the appellant is entitled to have it set aside
H ex debito justitiae. I, therefore, would allow the appeal, and make the following orders:

(1) the judgment in default dated 21 March 1994 be and is hereby set aside;

(2) the respondent shall pay the costs of this appeal and all costs incurred
I in the court below to the appellant in any event;

(3) the appellant shall deliver his defence within 14 days from today;

(4) that there be an early trial of the action; and

(5) that the deposit paid by the appellant be refunded to him.

Gopal Sri Ram JCA: This is an appeal against the decision of Ong See Seng J, dismissing the appellant's application to set aside a judgment entered against him for his default in delivering his defence to the respondent's statement of claim. We heard the appeal on 9 January 1995, and, at the conclusion of argument, reserved judgment. I now hand down my reasons for the decision I have reached in this case.

For convenience, I propose to refer to the parties as plaintiff and defendant, respectively. I also wish to make it clear that the Orders and Rules referred to in this judgment are those set out in the Rules of the High Court 1980 unless otherwise indicated.

The facts

The plaintiff is the registered proprietor of four pieces of land along Jalan CM Yusof in Ipoh. There is a building on the land. I will refer to them as 'the premises'. The defendant runs an hotel on the premises. It is styled 'Cathay Hotel'. He was a tenant of the former owner. The plaintiff bought the premises from the previous owner for a substantial sum of money. He paid nearly RM4.4m for it. He bought it subject to the tenancy which the defendant had with the previous owner. On 21 March 1993, the previous owner of the premises wrote to the defendant and told him about the sale to the plaintiff. On 22 April of that year, the plaintiff sent a notice to the defendant terminating the tenancy and calling for vacant possession. But the defendant did not comply. So, the plaintiff commenced an action against the defendant in the Sessions Court at Ipoh claiming vacant possession. Pleadings were filed and exchanged. This included a counterclaim by the defendant. Later, on 5 August 1993, the plaintiff discontinued the action. On the same day, he took out an originating summons intituled generally in the Rules of the High Court 1980. The summons does not specify under which of the 93 Orders the court was being moved. By this summons, which required an appearance, the plaintiff claimed the following relief:

(a) that the defendant vacate and deliver vacant possession of the whole of the premises No 88, 90, 92 and 94 Jalan CM Yusof, Ipoh to the plaintiff forthwith;

(b) that the defendant, by himself, [his] workers or agents or whosoever be restrained and an injunction be hereby granted restraining them from trespassing or continuing to reside at the said premises;

(c) that the defendant do pay to the plaintiff mesne profit at the rate of RM7,200 starting from 31 May 1993 until date of delivery of vacant possession;

(d) in the alternative, the defendant do pay to the plaintiff damages based upon the new rent at the rate of RM12,000 per month with effect from 31 May 1993 until date of delivery of vacant possession;

(e) that the costs in this action be paid by the defendant to the plaintiff; [and]

(f) further or other reliefs which this court deems fit.

On 14 August 1993, the defendant entered a conditional appearance to this summons and, on 25 August 1993, filed an application to strike it out. The defendant's application, which was by summons-in-chambers, came on for hearing before the learned judge on 10 January 1994. The judge, after hearing argument reserved his decision, which he delivered on 29 January 1994. He directed that the matter be proceeded with as if commenced by writ and ordered the respondent to deliver his statement of claim within 14 days. In making the order that he did, the learned judge no doubt exercised the power and discretion vested in him by O 28 r 8.

The plaintiff delivered his statement of claim on 14 February 1994 which is outside the time limited by the order of court. It is therefore clear that the plaintiff was himself in default of the order of 29 January. This matter was not raised during argument. However, it was drawn to my attention by both my learned brothers, Shaik Daud and VC George JJCA, in the course of my writing this judgment. I do not propose to make any further comment upon this aspect of the case except to say that I respectfully share the views that my learned brothers have expressed upon the subject in their separate judgments which I have read in draft.

In his statement of claim, the plaintiff claimed the following relief:

(a) the defendant gives and deliver[s] vacant possession of land known as CT 16110, Lot 2016, CT 16111, Lot 2017, CT 16112, Lot 2018, CT 16113, Lot 2019 all in Mukim of Ipoh, Daerah Kinta, Negeri Perak and also known as premises no 88, 90, 92 and 94, Jalan CM Yusuf, Ipoh;

(b) damage[s] on the basis of market rentals at RM12,000 a month from 1 April 1993 or 1 June 1993 until 30 September 1993;

(c) damages on the basis of market rental at RM15,000 a month from 1 October 1993 until the date to be fixed by this court;

(d) market rental from the period which will be fixed by the court until surrender of vacant possession by the defendant;

(e) alternatively, mesne profit from 1 April 1993 or 1 June 1993;

(f) costs; [and]

(g) further or other reliefs which the court deems fit.

Now, there is some controversy about whether the learned judge made an order requiring the defendant to deliver his defence not later than 14 days after receipt of the statement of claim. Mr Gurubachan Singh, who appeared for the plaintiff in the court below and in the appeal before us, says that such an order was made. Mr Tan Phock Kin who appeared for the defendant at the High Court and in this appeal, told us there was no such order. Because of the decision I have reached in this appeal, there is no necessity for me to resolve the disagreement between counsel based on their recollection of the order made by the trial judge. Indeed no such disagreement would have arisen if the learned judge had made himself absolutely clear in the note that he made. Nevertheless, so much was said about the directions the judge gave that I propose to recite what he actually noted. This is how the note made by him on 29 January reads:

I hold that at [the] material time the lower court suit has been discontinued and there is no duplicity of proceedings. I also hold that here is likelihood of disputes of fact arising and OS is not the proper form of proceedings. I direct the proceedings to be continued as a writ. I order the plaintiff to file and serve statement of claim within two weeks from date hereof. Costs to be costs in the cause.

(Sgd)
Ong See Seng J

As can be seen, there is nothing in the note requiring the defendant to deliver his defence. Even if it can be said (and I shall explain shortly why it cannot) that this is to be understood, there is specified no time limit for him to perform this act. In an action commenced by writ, the time within which the several pleadings must be delivered is expressly provided for in O 18. But where an order for conversion is made by a judge under O 28 r 8(1), the provisions of O 18 are not automatically attracted. A judge when acting under O 28 r 8(1) must give specific directions about the future conduct of the action. He may, as was done in this case, order the delivery of formal pleadings; or he may direct that the affidavits filed do stand as pleadings (although this should be avoided as affidavits cannot be amended nor particulars be asked upon them); or he may direct the filing of only points of claim and defence and require the filing of issues, and he may in appropriate cases dispense with discovery. But, whatever directions a judge may give, they must be clear and designed to regulate the future conduct of the action and to ensure its speedy disposal.

There is one other matter that requires mention. It has to do with the extracted form of the order made by the learned judge. There is nothing said in it about the defence. But that is hardly surprising. In practice, the registrar, when settling an order, is guided entirely by the written note made by the judge as indorsed on the file by the clerk in attendance. For this reason, the registrar will reject any direction in the draft order presented to him for his approval if it does not accord with the judge's note. This has been my experience at the Bar.

Before us, it is common ground that no attempt whatsoever was made at any stage of the proceedings to amend the extracted order to include an obligation on the defendant to deliver his pleading. Indeed, by reason of the practice I alluded to a moment ago, any such attempt would have met with singular failure in the absence of a further and separate direction to that effect from the judge himself. Such a direction was never sought by the plaintiff in this case.

I must now return to the narrative. The defendant, being dissatisfied with the order of conversion made by the learned judge, appealed to the Federal Court (then the Supreme Court). This appeal (Supreme Court Civil Appeal No 02–110–94) was heard and dismissed by the Federal Court on 11 October 1994.

While that appeal was still pending, an exchange of correspondence took place. It began on 23 February 1994 with a letter from the defendant's solicitors to solicitors for the plaintiff. This is what it said:

23 February 1994

Messrs Bachan & Kartar
Advocates & Solicitors
1st Floor, No 31, Jalan Dato Maharaja Lela
(Jalan Station)
30000 Ipoh
Perak

Dear Sirs

Supreme Court Civil Appeal No –94
(Ipoh High Court Originating Summons No 24–638–93)

To avoid the necessity of applying to court which we otherwise have to do, we are writing to you to enquire if you are agreeable to a stay of proceedings pending the above appeal to the Supreme Court and that the statement of defence be filed only after the outcome of the said appeal.

Yours faithfully
—Sgd—

The reply from the plaintiff's solicitors to the suggestion made by the defendant's solicitors was stern and terse. It reads as follows:

26 February 1994

Bachan & Kartar
Advocates & Solicitors

Messrs Thillaimuthu & Phock Kin
Advocates & Solicitors
No 8–B, Beach Street
10300 Penang AR Registered

Dear Sirs,

Re: Ipoh High Court Originating Summons No 24–638–93

We refer to your letter dated 23 February 1994

We disagree to stay of proceedings. If you do not file your defence within due time we shall proceed to take judgment in default.

Yours faithfully
—Sgd—
Bachan & Kartar

To this letter the defendant's solicitors made the following response:

5 March 1994

Messrs Bachan & Kartar
Advocates & Solicitors
1st Floor, No 31
Jalan Dato Maharaja Lela
(Jalan Station)
30000 Ipoh
Perak

Dear Sirs

Supreme Court Civil Appeal No -94
(Ipoh High Court Originating Summons No 24-638-93)

We refer to the above matter and to your letter to us of 28 February 1994 which we received yesterday.

We are applying to court for stay of proceedings until the outcome of the appeal to Supreme Court.

In the circumstances it will be appreciated if you can agree that defence need be filed only one week after the outcome of this application to court. At any rate you failed to conform with the order of court that proceeding be by writ of summons and not by originating summons.

As you have not extracted the said perintah, we enclose herewith three (3) copies of draft perintah made on 29 January 1994 in conformity with Yang Arif's nota-nota keterangan as your draft order.

Kindly return same to us within 48 hours pursuant to O 42 r 8 of the Rules of the High Court 1980 so that we can forward the same to Yang Arif with our amendments for settlement pursuant to O 42 r 4 of the Rules of High Court 1980 to embody the manifest intention of the court.

We shall be writing to Yang Arif to settle the said draft perintah requesting that the said perintah be settled on the same day as this application.

Yours faithfully
—Sgd—

The defendant's solicitors, no doubt acting *ex abundanti cautela*, copied this letter to the learned judge's secretary and to the senior assistant registrar to keep the learned judge, and, more importantly, the registrar informed of the course the defendant intended to pursue. There are three matters that arise from this letter that I pause to mention.

The first is the date of the letter from the plaintiffs solicitors which is stated as 28 February when it should be 26 February. The second is the erroneous belief on the part of the defendant's solicitors that the judge had required a writ to be filed. What in fact the judge had obviously meant was that the proceedings be carried on *as though commenced by writ*. There was, therefore, no obligation on the plaintiff's part to file a writ. All he was required to do was to deliver a statement of claim and this he had already done. The third is the reference in the letter to the notes recorded by the learned judge. It appears from the context of the letter that, at the time it was written, the parties already had the notes in their possession. Counsel for the plaintiff must have noticed the glaring omission in them about the defendant being required to deliver his defence. He could have very easily sought an appointment before the judge and got the notes amended. But he did nothing about it. I find his failure in this respect, to say the least, quite astonishing.

On 7 March 1994, the plaintiff's solicitors replied the letter of 5 March and also copied it to the registrar. Their letter is in the following terms:

7 March 1994

Messrs Thillaimuthu & Phock Kin
Advocates & Solicitors
No 8–B, Beach Street
10300 Penang

Dear Sirs

Re: Ipoh High Court Originating Summons No 24–638–93

We refer to your letter dated 5 January 1994 which we received today.

We do not agree to your suggestion contained in para 3 of your letter. We also do not agree with your contention of non-compliance by us. We have complied with the order of court.

With regard to para 4 of your letter you should be the one extracting the order being the applicant.

With regard to para 3 of your letter we return herewith the draft order with the Malay version amended at p 2 to read as 'sebagai' and not 'dengan'.

The question of settling the draft order before His Lordship does not arise.

Yours faithfully
—Sgd—

On 10 March 1994, the defendant filed a summons-in-chambers seeking an order staying all proceedings, including the delivery of his defence. That summons was never fixed and therefore was never heard. In the course of argument before us, counsel for the plaintiff submitted that there was a further duty on the defendant's solicitors to make an attempt to have the summons for a stay fixed or at the very least to have moved for an interim stay. I agree that the defendant could have done all that has been suggested by Mr Gurubachan Singh. But I think that in the circumstances of this case, the duty to fix the application rested with the court. The registrar had been made aware of the urgency of the matter by way of the letters copied to him. He was aware of the plaintiff's insistence in having the defence on file and of the defendant's intention to have this put off until after his appeal had been disposed of. In these circumstances, the registrar should have consulted the judge and fixed an early date for the disposal of the defendant's summons. It is a matter of regret that this does not appear to have been done.

On 21 March 1994, the plaintiff presented a judgment form reciting the default of the defendant in delivering his defence. This was duly sealed and issued by the registrar notwithstanding the fact that the defendant's summons for a stay was on file and had not been disposed of. There was also no regard had to the absence in the extracted order of 29 January of a requirement to deliver a defence. Speaking for myself, I find the procedure followed to be entirely wrong and that it should not be passed over without adverse comment. In my opinion, the registrar should, in the light of the circumstances of which he was under advice, have returned the judgment

form to the plaintiff without sealing it, but accompanied it with a request that the plaintiff re-present it after the disposal of the defendant's summons. He should have then assigned the earliest available hearing date to the defendant's summons for a stay. That, I believe, would have met the exigencies and the justice of the case.

Now, the judgment in default in essence required the defendant:

(i) to deliver vacant possession of the premises to the plaintiff;

(ii) to pay to the plaintiff damages for unlawful occupation at the rate of RM15,000 per month commencing 1 June 1993 until the delivery of vacant possession; and

(iii) to pay to the plaintiff the costs of the action.

By a letter dated 21 May 1994, solicitors for the plaintiff informed the defendant's solicitors that they had entered judgment in default of defence. A copy of the judgment was enclosed. The letter also indicated that the plaintiff was in the process of executing the judgment.

On 26 May 1994, the defendant took out an application in the form of a summons returnable in chambers seeking an order that the judgment in default be set aside. There was also a prayer for an injunction restraining the plaintiff from executing upon the judgment until after the hearing and disposal of the defendant's appeal which was then still pending before the Federal Court. This application came up inter partes before the judge on 7 June 1994. Counsel for the defendant informed the judge that the plaintiff had proceeded to execute the default judgment. The learned judge then made an order staying execution pending the hearing of the defendant's application and adjourned the summons to 17 June for hearing.

The application of the defendant was heard on 17 June. Counsel for the defendant argued, inter alia, that the plaintiff had invoked the court's summary jurisdiction under O 89 which empowered only a judge to enter judgment. In the present case it was the registrar who had entered judgment. Therefore, said counsel, the judgment was irregular. Counsel for the plaintiff, on the other hand argued that it was a regular judgment and that there was admittedly no affidavit showing a defence on merits. Mr Gurubachan Singh informed us that he had argued before the judge that the originating summons in this case had been taken out under O 28 and that at no time had the summary jurisdiction of the court under O 89 been invoked. He may well have presented this argument, but the note recorded by the learned judge does not reflect this.

The learned judge, after hearing counsel, reserved his decision to 24 June, on which date he dismissed the defendant's summons. He held that the judgment in default was regular. It is against this decision that the present appeal has been brought.

The submissions of counsel

Counsel for the defendant repeated before us the submission he had made before the learned judge. I have already set it out earlier. He also submits

A that judgment was entered for more than what has been claimed by the plaintiff in his statement of claim.

In reply, counsel for the plaintiff made three submissions. His first submission is that the originating summons was not taken out under O 89 but under O 28. That, as I have pointed out earlier, is the submission he B says he made to the learned judge. Second, he submits (but without conceding the point) that even if it be the case that the plaintiff had initially moved the court under O 89, the order for conversion made by the judge on 29 January terminated the summary jurisdiction and turned the proceedings into an ordinary action for vacant possession. Thirdly, he submits that even if the judgment is irregular for any reason, it should be C allowed to stand by resort being had to O 2 r 1. Although I shall deal with each of these submissions in turn, because they raise interesting points of law, it is my opinion that this appeal turns upon only two issues, namely: (1) whether the whole of the default judgment of 21 March is irregular; and (2) if it is not irregular in its entirety, then, whether it should be set D aside in toto or whether it should be permitted to survive in part. On the other hand, if it is a regular judgment then, upon the concession made by Mr Tan Phock Kin before us that there is no affidavit of merits, the appeal must, in the view that I take of the law as settled by high authority, fail.

Did it begin as an O 89 case?

E

The plaintiff, as noted earlier, says that if one were to undertake a careful scrutiny of the originating summons and the affidavit in support, one would come to the conclusion that it is not an application made under O 89. The summons does not, as I observed very early in this judgment, state any particular rule of court in its intitulement. Now, I think that that F is not only wrong but plainly embarrassing. How, might one ask, is a defendant or the court to determine which rule of court the plaintiff is invoking unless he explicitly specifies it? If a defendant and the court should have to conduct a close examination of the supporting affidavit in each case in order to determine the particular jurisdiction or power that is G being invoked by an originating summons or other originating process that requires an intitulement, then a plaintiff will be at liberty to shift from one rule to another or indeed from one statute to another as it pleases him without any warning whatsoever to his opponent or the court. It would make a mockery of the principle that there must be no surprise in civil litigation. If the submission of counsel be the law, then it is wrong. But I H am firmly of the view that it is not.

In my judgment, this matter, which is a point of practice and procedure, is to be resolved by reference to the fundamental principle that a party must not take his opponent or the court by surprise. It is my opinion that an originating process requiring an intitulement must state, I with sufficient particularity, either in its heading or in its body, the statute or rule of court under which the court is being moved: otherwise it would be an embarrassing pleading and be may be liable to be struck out, unless sooner amended.

There is another difficulty that lies in the way of the plaintiff in the present case. It is this. In his affidavit in opposition, the defendant asserted that the plaintiff had invoked the summary procedure under O 89. In his affidavit in reply affirmed on 8 June 1994, the plaintiff admitted this. Before us counsel for the plaintiff says that this was an erroneous admission of law and therefore not binding on the plaintiff. I will not express any concluded view on this submission. It is not necessary for me to do so because of the route I have taken to arrive at my decision in this appeal. But I will say this. Even assuming counsel to be correct in the submission he has made, the concession in the affidavit would leave its reader with the distinct impression that the summary jurisdiction was indeed being invoked. Under such circumstances, it may amount to a miscarriage of justice to allow the plaintiff to resile from the impression created but not corrected at first opportunity.

Having taken into account all that has been said on both sides of the Bar, having read and reread the summons and the affidavits filed by the plaintiff several times and having given the matter my most anxious consideration, I am left with the indelible impression that the plaintiff did in fact resort to the O 89 procedure for the purpose of obtaining vacant possession of the premises with all due haste. One can well understand the plaintiff's desire to have vacant possession soonest possible. He has paid a very large sum for the premises and probably has his own plans for their future use. He undoubtedly feels, not without justification, that his attempts at obtaining vacant possession are being thwarted. But the real reason for the present state of affairs is the plaintiff's resort to short cuts that really are, and have proved to be, a much longer route to his intended destination.

Does O 28 r 8 apply to O 89?

I now turn to the second submission of plaintiff's counsel. To recall, it is that even if he had initiated the summary procedure for vacant possession, the order of the learned judge of 29 January converted it into an ordinary action for vacant possession. The judge, as I have earlier said, no doubt acted under O 28 r 8(1) to make the order he did. The affirmation by the Federal Court puts the correctness and propriety of the judge's decision beyond question. The unreported decision of the English Court of Appeal in *Eyles v Wells* decided in 1991 and noted in *The Supreme Court Practice 1995*, which was cited to us by counsel for the plaintiff is authority for the proposition that a summons taken out under the English RSC O 113 (the equipolent of our O 89) may be ordered to continue as a writ. *The Supreme Court Practice 1995* indicates that only the Bar transcript of the case is available. It would have been advantageous to have read this, but it was not made available to us through no fault of counsel.

I hope that I will be forgiven if I say that I do not subscribe to the view expressed by counsel. Bound as I am by the Federal Court's affirmation of the learned judge's decision, I propose to do nothing in contravention of the doctrine of stare decisis. But I feel obliged to state my own views on the matter.

Speaking for myself, I am entirely uncertain as to whether a judge is entitled to, and, more importantly, whether he should, act under r 8(1) of O 28 and direct proceedings commenced by originating summons under O 89 to be continued as though they were commenced by writ. There is absolutely no doubt that he *may*, generally speaking, exercise the power under r 8(1) of O 28 where it appears to him that viva voce evidence is required to decide upon factual disputes for the determination of which the originating summons procedure is manifestly unsuitable. Equally, he *may*, in an appropriate case, dismiss the summons and leave the plaintiff to commence an action by writ. Cases in which a dismissal may be appropriate include those in which it is patent upon the face of the summons or the affidavit in its support that the complaints raised cannot but be tried in a writ action. The plaintiff, in such a case as that alluded to, must be taken to know ab initio that the mode he selected to commence the proceedings was manifestly unsuitable.

The Malayan Law Journal is replete with cases where proceedings commenced by an originating summons or motion were either stayed or dismissed for want of suitability. The decisions in *Ong Yok Chu v Yong Teck Fong* [1960] MLJ 292 and *Yap Hong Thin v Seenevasam* [1970] 1 MLJ 143 are two examples of this. Ultimately it is for the judge, in the exercise of his pure discretion, to decide which course he prefers to adopt and he cannot be faulted for choosing one course rather than the other.

But, as I have said, I am not at all sure that such a discretion exists and, if it does, whether it should be exercised at all, in cases brought under O 89 r 1 of which reads as follows:

> Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order.

Prior to the introduction of this provision into the Rules, the only proper procedure available in all cases for the recovery of possession of immovable property was a writ action: *Yap Hong Thin v Seenevasam*. Indeed, this continues to be the case save and except in the very limited category of cases to which O 89 applies. It is, as I have said, a summary procedure meant primarily for the eviction of squatters. For, it frequently happens that land or even a building is occupied by persons who are essentially trespassers whose identities are often unknown to the plaintiff. To require a plaintiff, in those circumstances, to commence a writ action and name the defendants would constitute the imposition of an intolerable burden upon him. It is to meet this problem that the rules committee passed O 89. That Order is not meant to be, and, should not be, used for the recovery of property occupied by tenants whose tenancies have come to an end. The words in parentheses appearing in the first Rule of that Order makes this abundantly clear. The summary jurisdiction that the Order has created is not a substitute for the ordinary action for vacant possession and should

not be permitted to be so used. Where resort is had to the summary procedure, strict compliance of its terms is essential: *Re 9, Orpen Road, Stoke Newington* [1971] 1 All ER 944; [1971] 1 WLR 166.

Yet I have seen in this court, when hearing applications for leave, several cases in which O 89 has been invoked on the basis of facts that plainly fall outside its scope. Where this occurs, I cannot but reach the conclusion that there is an abuse of the court's process which, in my judgment, is not sufficiently punished by the mere conversion of the summons to a writ. I therefore regret that I am unable to agree with the conclusion arrived at by the English Court of Appeal in *Eyles v Wells*.

Despite any misgivings I may entertain as to the correctness of the order made by the learned judge on 29 January 1994, it is now no longer possible or proper for the defendant to complain that the judgment is irregular for non-observance of the mandatory provisions of O 89. There is therefore merit in the submission of counsel for the plaintiff that even if the summary procedure had been initially resorted to in error, the order of the learned judge that the proceedings continue as though commenced by writ converted the entire proceedings into an ordinary action for possession. It follows that the judgment in default is not irregular for the first reason advanced by the defendant.

Regular or irregular judgment?

That brings me to the second ground of irregularity relied on by the defendant. Here I think Mr Tan stands on firmer ground in his submission that judgment was entered for too much. A comparison of the relief claimed by the plaintiff and what was given him by the judgment in default, when made, reveals that the defendant is correct in the complaint he has made to us. The judgment does not accord with the relief claimed in so far as the damages are concerned. I have earlier in this judgment set out both the relief claimed and the terms of the default judgment and therefore propose to say no more about it. So much of the default judgment that awards damages to the plaintiff is, in my opinion, plainly irregular and, following the norm (which counsel for the plaintiff conceded in the course of his address in the court below), the defendant is entitled to have it set aside. But should we excuse the error in the plaintiff's favour? That question brings me to the third submission made by Mr Gurubachan Singh.

Irregularities and nullities

Before the Rules of 1980, there was a distinction made between mere irregularities and nullities. The former were excused and the proceedings were allowed to continue. The latter were serious and resulted in the setting aside of the proceeding, the striking out of originating process and in the discharge of orders. For instance, if judgment in default is entered in non-compliance of an order of substituted service, it was deemed a nullity and set aside ex debito justitiae, ie without reference to the merits of the case: *Leow Boke Chooi v Asia Motor Co Ltd* [1967] 2 MLJ 109.

But the position is now different under the present Rules, O 2 r 1(1) of which states:

> Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

In *Harkness v Bell's Asbestos & Engineering Ltd* [1967] 2 QB 729; [1966] 3 All ER 843; [1967] 2 WLR 29, Lord Denning explained the change brought about by this Rule. He said ([1967] 2 QB 729 at p 735; [1966] 3 All ER 843 at p 845; [1967] 2 WLR 29 at p 33):

> This new rule does away with the old distinction between nullities and irregularities. Every omission or mistake in practice or procedure is henceforward to be regarded as an irregularity which the court can and should rectify so long as it can do so without injustice.

The Rule has also been more recently addressed in *Metroinvest Ansalt v Commercial Union Assurance Co Ltd* [1985] 2 All ER 318; [1985] 1 WLR 513 where Cumming-Bruce LJ, explained the application of O 2 r 1 in this way ([1985] 2 All ER 318 at p 323; [1985] 1 WLR 513 at p 520):

> As I construe O 2 r 1, from the moment a step in proceedings is tainted by irregularity through failure to comply with the rules, the irregular step or document remains irregular inter partes until the matter has been brought before the court and the court has decided in which way to exercise the jurisdiction conferred by O 2 r 1(2). Order 2 r 2 does not restrict the power of the court in the sense of restricting its jurisdiction, and does not have the effect of suspending the irregularity until the application under O 2 r 2 is made. The purpose and effect of O 2 r 2 is to prescribe the procedure if and when an opposite party decides to apply so that the court on recognising the irregularity, may exercise its powers under r 1(2) by taking the action of killing or curing the irregular proceeding.

In *Sunkyong International Inc v Malaysian Rubber Development Corp Bhd* [1992] 2 MLJ 146, an order to serve a writ out of jurisdiction had been obtained on an affidavit that was irregular, in that it failed to comply with the mandatory form which required a statement that the plaintiff had a good cause of action. The omission by the plaintiff to do so was one of the grounds relied on by the defendant to set aside the order granting leave. The Supreme Court held that the omission, being a failure to comply with the Rules, was not fatal and was curable under O 2 r 1(1) and (2) without any amendment and refused to intervene on that ground, although the appeal was partially allowed on another ground.

In the appeal before us, the defendant's summons to set aside the default judgment is such an application as contemplated by Cumming-Bruce LJ in *Metroinvest Ansalt*. It is for this court now to decide whether the proceeding should be killed, in the sense that the default judgment

should be set aside or whether it should be allowed to survive. I am of the opinion that the choice should be made by reference to settled principles.

The judgment for damages

Now, it is an established principle that in monetary claims, the amount for which judgment is entered must be limited to the amount actually due: *Hughes v Justin* [1894] 1 QB 667; *Muir v Jenks* [1913] 2 KB 412. In other cases, where the claim is non-monetary, judgment should be entered for the precise relief claimed by a plaintiff in his statement of claim. If judgment is entered for more than is actually due, it is liable to be set aside. If an error appears in the judgment then this may be corrected in the following circumstances:

(i) on an application duly made by the plaintiff in that behalf: *Armitage v Parsons* [1908] 2 KB 410;

(ii) on an application made by the defendant to set aside the judgment: *Ban Hin Lee Bank Bhd v Somali Bank* (*The Independent*, 28 November 1988), CA; and

(iii) ex parte, where the defendant consents to such a course.

Applying the principles in the decided cases, it is my judgment that the default judgment entered by the plaintiff on 21 March 1994, in so far as it relates to the award of damages for unlawful occupation is irregular. The learned judge was wrong in holding otherwise. Should it then be set aside?

After considering all the circumstances of the case, and applying those principles that I have made reference to, I have reached the conclusion that it should. In my judgment, this is not a case where justice will be served by allowing the irregular judgment for damages to survive. Accordingly, that part of the default judgment that requires the defendant to pay damages is set aside.

The judgment for possession

Coming now to so much of the judgment in default as directs the defendant to vacate and deliver vacant possession of the premises to the plaintiff, this would have been governed by the provisions of O 19 r 5(1) if the action had been originally commenced by writ. That rule reads:

> Where the plaintiff's claim against a defendant is for possession of immovable property only, then, if that defendant fails to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under these rules for service of the defence, and on producing a certificate by his solicitor, or (if he sues in person) an affidavit, stating that he is not claiming any relief in the action of the nature specified in Order 83, rule 1, enter judgment for possession of the immovable property as against that defendant and for costs, and proceed with the action against the other defendants, if any.

Since the action in the present case was commenced by an originating summons, which was, by the order of the judge, to be continued as if

commenced by writ, the provisions of this Rule were not attracted to the case at hand. Accordingly, there was no necessity for the certificate.

I have, in the course of this judgment, referred to the several unsatisfactory features attending the entry of the judgment against the defendant for his alleged default in delivering his defence. No useful purpose will be served by their repetition. In the final analysis, the critical question I have to ask myself is the same, namely, whether in all the circumstances the default judgment for possession should be allowed to stand. I have turned this question over in my mind several times and considered all aspects of the case most anxiously and have come to the conclusion that the question must be answered against the plaintiff.

Despite all that has been said by his counsel in his favour, I am not inclined to accede to his submission that the judgment for possession should be permitted to survive. It is a most serious matter to shut out a defendant from having his say in court. This is all the more so when there is lingering uncertainty as to whether a default had ever taken place.

The circumstances attendant upon the entry of the judgment appear to me to be very much akin to a case where judgment is prematurely obtained. Where this happens, the judgment should, in my opinion, be set aside ex debito justitiae without resort to the court's curative powers as was the previous practice. (See *Leow Boke Chooi* [1967] 2 MLJ 109.) On the facts of this case, the judgment in default should, to borrow the colourful language of Cumming-Bruce LJ, be killed in its entirety.

The result

For the reasons expressed in this judgment, I would allow the appeal and agree with the form of the order proposed by my learned brother Shaik Daud JCA in his judgment which I have had the advantage of reading.

13 January 1995

VC George JCA:

The defendant/appellant had sought to have the originating summons ('OS') by which these proceedings were commenced, dismissed in limine on the ground that it would have been commenced as a writ action. The judge who heard the application, found merit in the complaint but declined to dismiss the OS. Although he held that there 'is a likelihood of disputes of facts' and that it should not have been commenced by OS, what he did in effect was to invoke O 28 r 8 [of the Rules of the High Court 1980 ('the Rules')] to order that the proceedings be continued as if it had begun by writ. Order 28 r 8(2) requires that the judge should, in making such an order, give directions as to the future course of the action. The record shows that the learned judge did give some directions. As there is some controversy in respect of this, what is shown in the record in respect of the orders that were made are reproduced here. At p 116 of the record of appeal are the relevant notes of proceedings. The learned judge wrote:

> I direct the proceedings to be continued as a writ. I order the plaintiff to file and serve statement of claim within two weeks from date hereof. Costs in the cause.

The relevant portions of the formal order that was extracted in respect of the order and the directions given are at p 33 of the record:

> It is ordered that this proceedings [sic] be continued as a writ and that the plaintiff do file and serve a statement of claim within two (2) weeks from the date hereof.
>
> It is lastly ordered that costs be costs in the cause.

The defendant/appellant appealed to the Supreme Court in respect of the refusal by the learned judge to dismiss the OS which appeal was, on 11 October 1994, dismissed. The plaintiff had not waited for the outcome of the appeal but had filed and served a statement of claim purportedly pursuant to the directions. It was dated 14 February 1994. Presumably it was filed on or soon after that date.

It was obvious that if the defendant was successful in his appeal to the Supreme Court there would have been no need for a statement of defence to be filed. The solicitors for the defendant wrote to the solicitors for the plaintiff seeking their consent to the statement of defence being filed after the disposal of the appeal to the Supreme Court. This was refused. The plaintiff's solicitors by their letter dated 26 February 1994 in refusing the stay sought, went on to state:

> If you do not file your defence within *due time* we shall proceed to take judgment in default. (Emphasis provided for reasons that will be obvious shortly.)

The defendant's reaction to this was to file a summons-in-chambers seeking a stay of all proceedings including the filing of a statement of defence pending the outcome of the appeal to the Supreme Court. As can be seen at pp 72E and 74D, the application was filed on 10 March 1994 and the court allotted 13 May 1994 for the hearing of the summons. It was served on the plaintiff's solicitors on 11 March 1994. In effect, the defendant's stand was to let the court decide on the question of whether the statement of defence had to be filed before the appeal was disposed of. However, in spite of the pending application, on 21 March 1994, without further notice to the defendant's solicitors, the plaintiff's solicitors caused the registrar of the court to allow default judgment to be entered in the terms in which it was drawn by the plaintiff's solicitors. A copy of the default judgment is at p 15 of the record:

> Penghakiman keingkaran pembelaan
>
> *Setelah* pernyataan tuntutan plaintif difailkan pada 14 Februari 1994 dan disampaikan kepada defendan dan beliau gagal dalam memfailkan dan menyampaikan tuntutan pembelaan kepada plaintif selepas tamatnya tempoh yang ditetapkan iaitu di bawah Kaedah-Kaedah Mahkamah Tinggi 1980 bagi memfailkan dan menyampaikan pernyataan pembelaan.
>
> *Disebabkan oleh keingkaran defendan* setelah diperintahkan oleh mahkamah ini pada 29 Januari 1994 untuk memfailkan pernyataan pembelaan dalam

masa 14 hari dari tarikh pernyataan tuntutan difailkan oleh plaintif yang telah difailkan pada 14 Februari 1994.

Seterusnya dihakimi bahawa defendan memberi dan menyerahkan milikan kosong tanah yang dikenali sebagai CT 16110, Lot 2016, CT 16111, Lot 2017, CT 16112, Lot 2018, CT 16113, Lot 2019 semuanya di Mukim Ipoh, Daerah Kinta, Negeri Perak dan juga dikenali sebagai premis No 88, 92 dan 94, Jalan CM Yusof, Ipoh kepada plaintif.

Dan juga dihakimi bahawa defendan membayar kepada plaintif ganti rugi bagi kepenghunian menyalahi undang-undang (unlawful occupation) pada kadar RM15,000 sebulan mulai 1 Jun 1993 sehingga penyerahan pemilikan diberi kepada plaintif.

Dan akhirnya dihakimi bahawa defendan membayar kepada plaintif kos yang akan ditetapkan oleh timbalan pendaftar mahkamah ini.

Bertarikh 21 Mac 1994.

It is to be noted that the preamble to the order (which was drawn not by the registrar but by the plaintiff's solicitors) in effect states that it is entered because the defendant had failed to file and serve the statement of defence within the period prescribed by the Rules of the High Court 1980.

It is also to be noted that having ordered vacant possession of the land and premises, the order went on to provide for damages to be paid at RM15,000 per month from 1 June 1994 until vacant possession was given to the plaintiff.

By summons dated 26 May 1994, the defendants applied to have the default judgment set aside. The learned judge dismissed the application. He said (at p 76 of the record):

> I rule that the judgment in default dated 2 March 1994 was regularly obtained. I find that there is no affidavit of merits of defence herein. Accordingly, I dismiss defendant's application to set aside the judgment in default. Costs of the application to the plaintiff. I also set aside the interim order for stay of execution granted on 7 June 1994.

The appeal before us is against that order of the judge.

There are a number of grounds of appeal set out in the memorandum of appeal most of which were based on what appears to be the assumption on the part of the defendant and his legal advisers that the OS had been taken out pursuant to O 89. The Order under which the OS was taken out was not specified on the summons and that makes for taking both the applicant's opponent and the court by surprise. Encik Gurbachan Singh of counsel for the plaintiff, before us, submitted that it never had been an O 89 OS but was ab initio an O 28 OS. However, when the defendant by his affidavit on 24 May 1994, in support of the application to have the judgment in default set aside, had asserted that the plaintiffs had taken out the OS pursuant to O 89, the plaintiff by his reply to it (affirmed on 8 June 1994) admitted that to be the position. Worse, Encik Gurbachan Singh himself appears to have contributed to his learned opponent labouring under the misconception (if misconception it was) by appearing to concede that the proceedings had been commenced as an O 89 OS in that in

response to the defendant's counsel's submission that the proceedings had been brought pursuant to O 89 he had said: A

> *Once the order was made to proceed as a writ, O 89 was no longer applicable.* Also the appeal filed without leave being obtained. No interim stay applied for in respect of execution after being informed of the default judgment. The default judgment was obtained under O 19 rr 2 and 5. The application to SAR was proper application [sic]. Plaintiff could not proceed under O 89 as for all practical purposes *OS no longer exists.* (Emphasis added.) B

In other words, until the order was made for the proceedings be continued as if it was a writ action, it had been an O 89 OS. The solicitors for the defendant were also labouring under the misconception that because their appeal was pending and because their application for a stay of proceedings until the disposal of the appeal was pending and they had served a copy of that on the plaintiff's solicitors, those solicitors could not act or would not steal a march on them and that accordingly there was no need to file and deliver a defence until after the application was disposed of. C D

The regularity of the default judgment vis-à-vis the entitlement of the plaintiff to enter it, was in issue before the learned judge in the court below as can be seen from the submissions made to the judge and from the ruling he made. At p 74D of the record is the relevant portion of Encik Gurbachan Singh's submission:

> The defendant defiled this court order by not filing defence. Request for stay and allow defence to be filed after appeal was rejected and warning given to take judgment when there is no order for stay [sic]. Plaintiff was fully entitled to proceed with default judgment. E

And at p 75B, he went on to submit:

> Rules of High Court should be obeyed — *Ratnam v Coomarasamy* [1965] 1 MLJ 226. F
>
> Defendant has shown defiance to the rules and the court order.
>
> Only ground to show merit [sic]. No merits disclosed. Application should be dismissed with costs.

G

Clearly one of the questions that arose for adjudication by the judge was whether there was a defiance by the defendant of an order or of the rules of the court in respect of the filing of the statement of defence that entitled the plaintiff to enter default judgment. The ruling made, as has been seen, is at p 76: 'I rule that the judgment in default dated 2 March 1994 was regularly obtained'. Before us the regularity is challenged, inter alia, by ground 1(2)(iii) of the memorandum of appeal: 'the claim for rental and mesne profit exceed the actual rental of RM3,500 a month paid to the plaintiff's predecessor-in-title'. H

In the course of the proceedings before us, particularly as we were somewhat hampered by there not being a written judgment or grounds for the decision, we had to and sought clarification, inter alia, in respect of the 'due time' relied on by the plaintiff, the assumption that there was some provision or a direction for the statement of defence to be filed within a I

prescribed period because we could find nothing in the record or in the Rules to substantiate such an assumption. Having directed that 'the proceedings to be continued as a writ' and having given directions for the filing of the statement of claim, for there to be 'due time' to file the defence there has to be, pursuant to O 28 r 8, a direction by the judge in respect of how and when the defendant should respond to the statement of claim. The times prescribed by O 18 for delivery of pleadings have no application here since the proceeding had not been commenced as a writ action. Counsel for the respondent appears to concede this to be the position. He said from the Bar in response to our query in respect of this that his recollection was that the judge had in ordering that the proceedings be commenced as a writ action, directed that the defence be delivered 14 days from the filing of statement of claim (his learned opponent had no such recollection). No explanation was given for the fact that both the judge's notes of proceedings and the formal order that was perfected had omitted any such direction. Counsel for the respondent also appeared to rely on the conduct of the solicitors for the defendant/appellant which he submitted was consistent with there having been such a direction.

Speaking for myself, the conduct of the solicitors for the defendants was, in respect of this, equivocal. No doubt they appear to have assumed that the statement of defence had to be filed within 14 days after the statement of claim was filed but that does not necessarily mean that directions to do so had been given. The submissions by counsel for the defendant suggests that he appears to have been under the erroneous impression that the effect of the judge's order was that the plaintiffs should cause a writ to issue and it accordingly is not surprising that he was under the further erroneous impression that O 18 applied and that accordingly the defendant had to file the statement of defence within 14 days of the statement of claim. In respect of this aspect of the matter, the plaintiff's solicitors appear to be equally confused. Before us, as has been seen, counsel for the plaintiff asserted that in fact he relied on directions given by the judge for the delivery of the statement of defence. However, what cannot be avoided noting is that the credibility of counsel's assertion is stretched somewhat thin in that there was that perfected order (and the judge's notes) in respect of the directions given in which there were no directions in respect of the filing or delivery of the statement of defence and no attempt had been made to have the alleged omission rectified. Any evidence that the order made is otherwise than as set out in a perfected order is not admissible except in proceedings to set aside or rectify or amend the order. And finally the default judgment, drafted by the plaintiff's solicitors, shows that what was relied on was a provision in the Rules for the delivery of the statement of defence and not any direction given by the court.

In the face of all these and in particular the terms of the order as set out in the order as extracted, in my judgment this court has no choice but to reject the said assertion by counsel and to hold that no directions were given in respect of the filing of the statement of defence. We also have to hold that in the context, the Rules do not prescribe a 'due time' for filing

of the defence. Accordingly, we have to hold that the preamble to the default judgment was erroneous and misleading and it in fact obviously mislead the learned registrar concerned into entering the default judgment. If he had not been so mislead he would no doubt have directed his mind to the directions that had been given and to the Rules and would have refused to enter default judgment as in fact there had been no default.

I pause to exhort registrars to be particularly careful in considering draft default judgments presented to the court and to have in mind that they are submitted without the other side having been given an opportunity of scrutinizing it. The registrar has to ensure not only that the judgment sought to be entered is for what the plaintiff is entitled to but that in fact there is default.

In the instant case, had the registrar paid the sort of attention he should have paid to the draft default judgment, he would also have realized that in fact the plaintiff was himself out of time! The direction given was that the statement of claim had to be filed and served within two weeks from 29 January 1994. Accordingly, the last day for filing and serving the statement of claim was 12 February 1994. However, as has been seen, it was filed not earlier than 14 February 1994. In the context, the effect of O 3 r 5 is that for the plaintiff to validly file a statement of claim after 12 February, time had to be extended by the court unless there was a consent in writing by the defendant. The record does not show that there was any such extension or consent.

The only aspect of this appeal that caused me any trouble was the fact that although the issue was canvassed both before the judge and us, the grounds of appeal do not include a complaint that in fact there was no default.

Rule 5(1) of the Rules of the Court of Appeal 1994 provides that appeals to the court shall be by way of rehearing. Rule 7 sets out the powers of the court and sub-rr (4) and (5) thereof are as follows:

> (4) The Court may draw inferences of fact, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires.
>
> (5) The powers aforesaid may be exercised notwithstanding that the notice of appeal relates only to part of the decision, and such powers may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties have not appealed from or complained of the decision.

Rule 18(1) provides for the appellant to set down in a memorandum of appeal the grounds of appeal. Then comes r 18(2) which provides that while the appellant may not without the leave of the court rely on any ground of appeal not included in the memorandum of appeal, '... but the Court in deciding the appeal shall not be confined to the grounds set forth by the appellant'.

In England, the grounds of appeal are set out in the notice of appeal. The powers equipolent to our Rules of the Court of Appeal 1994 rr 7 and

A 18(2) are in their r 10 of O 59. (In an earlier edition of the Rules of Supreme Court they were in the rules to Order LVIII.) Sub-rules (3) and (4) of r 10 are as follows:

> (3) The Court of Appeal shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been given or made, and to make such further or other order as the case may require.
>
> (4) The powers of the Court of Appeal under the foregoing provisions of this rule may be exercised notwithstanding that no notice of appeal or respondent's notice has been given in respect of any particular part of the decision of the court below or by any particular party to the proceedings in that court, or that any ground for allowing the appeal or for affirming or varying the decision of that court is not specified in such a notice; and the Court of Appeal may make any order, on such terms as the Court thinks just, to ensure the determination on the merits of the real question in controversy between the parties.

In *Purnell v Great Western Railway Co* (1876) 1 QBD 636 at p 640, Jessel MR with reference to the provision that appeals before the Court of Appeal are by way of rehearing said:

> The question now is, what are the powers of the Court of Appeal? Under Order LVIII r 2, it will be found that appeals to the Court of Appeal are to be by way of rehearing, that is, it is not to be confined to the points mentioned in the notice of appeal.

Another illustration of the wide powers given to the Court of Appeal is provided by the English case, *A-G v Simpson* [1901] 2 Ch 671 at pp 713 and 720. The court below had, inter alia, held that the defendant was entitled to collect a toll from the users of a river which right it held, exists independently of the obligation to repair or maintain the lock or stanch in the river under the control of the defendant. This lock is referred to in the judgment as the St Ives stanch. The plaintiff appealed various aspects of the judgment but not in respect of the above finding. The Court of Appeal however dealt with the issue although there was no appeal in respect of it, Vaughan Williams LJ saying at pp 712–713:

> Secondly, as to the St Ives stanch, I think the defendant Simpson is only entitled to the tolls so long as he keeps the stanch in such repair as to render the river navigable.
>
> I think that under Order LVIII r 4, we can make the proper declaration notwithstanding that there is no appeal by the plaintiffs against so much of the judgment as declares that the defendant is not bound to repair and maintain the works.

Stirling LJ said in respect of this at p 720:

> I agree as to the stanch below St Ives with what had been said by Vaughan Williams LJ.
>
> I think that this court ought to exercise the power conferred by Order LVIII r 4, namely, 'to give any judgment and make any order which ought to have been made, and to make such further or other order as the

> case may require'. The order confers power to do this, although the appeal may be from part of the judgment only, and although the respondent may not complain of the decision.

Clearly the Court of Appeal, both in England and here, is conferred with the power to make orders that the justice of the matter calls for, even in respect of matters not appealed against or raised as a ground of appeal.

Another aspect of the matter is that in the instant case, it is obvious that the point that in fact there had been no default on the part of the defendant and that in fact the plaintiff himself was in default had been not taken up because counsel for the defendant had failed to appreciate the true state of the matter.

In *Lee Hock Ning v Government of Malaysia* [1972] 2 MLJ 12, counsel on both sides had erroneously taken the view that s 2 of the Public Authorities Protection Ordinance 1948 applied in the matter, the subject of the action. The judge gave judgment on the basis that the plaintiff's counsel admitted that the section applied. The question that arose in the appeal from the judgment was the effect of the admission of counsel erroneously made. Ong CJ having dealt with a number of decisions on the applicability of the said s 2, said at p 14:

> The above decisions clearly show that in the view taken by counsel and the trial judge of s 2 they were all in error. Such error, of course, can be rectified, notwithstanding the admission of counsel for the plaintiff upon a mistaken view of the law.

For this proposition, reliance was placed on the judgment of Lord Denning MR in *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158; [1969] 2 All ER 119.

In that case, counsel had erroneously advised the judge of first instance on the measure of damages and the judge had accepted the advice. Lord Denning said ([1969] 2 QB 158 at p 166; [1969] 2 All ER 119 at p 121) with reference to the error made by the judge:

> It was submitted by Mr Smout that we could not or, at any rate, ought not to correct this error. I do not agree. We never allow a client to suffer for the mistake of his counsel if we can possibly help it. We will always seek to rectify it as far as we can. We will correct it whenever we are able to do so without injustice to the other side. Sometimes the error has seriously affected the course of the evidence, in which case we can at best order a new trial. But there is nothing of that kind here. The error was made at the end of the case. All the evidence had been taken on the footing that the damages were at large. It was only in the final submission that the error was made. Such an error we can, and will, correct.

Ong CJ in *Wong Lai Fatt v PP* [1973] 2 MLJ 31 at p 33 again cited that passage from Lord Denning's judgment to say: 'The paramount function and duty of the courts is to see that justice is done in all cases'.

Clearly there was no default on the part of the defendant and although that was not raised as a complaint, the default judgment should not be allowed to stand.

I now come to the complaint in the memorandum of appeal by the defendant that the 'claim for rental and mesne profits exceeded the actual rental of RM3,500 a month ...'. The prayers in the statement of claim in respect of damages are as follows:

> (b) Damages on the basis of market rentals at RM12,000 a month from 1 April 1993 or 1 June 1993 until 30 September 1993.
>
> (c) Damages on the basis of market rental at RM15,000 a month from 1 October 1993 until the date to be fixed by this court.
>
> (d) Market rental from the period which will be fixed by the court until surrender of vacant possession by the defendant.
>
> (e) Alternatively, mesne profit from 1 April 1993 or 1 June 1993.

The 'basis of market rentals at RM12,000 a month from 1 April 1993 or 1 June 1993' appears to stem from para 4 of the statement of claim:

> The plaintiff by his agent had sent a letter dated 24 March 1993 informing the defendant that the rental for premises No 88, 90, 92 and 94 will be increased from RM3,600 a month to RM12,000 per month commencing from 1 April 1993.

It is also appropriate to note paras 7 and 8 of the statement of claim:

> 7 The plaintiff states that in the month of April 1993 and or June 1993, the market rental of the said premises is RM12,000 a month.
>
> 8 On 23 September 1993, the market rental for the said premises is RM15,000 a month. The plaintiff claims damages for wrongful occupation amounting to RM12,000 from 1 April 1993 or 1 June 1993 and RM15,000 a month commencing from 1 October 1993.

It is elementary that what is pleaded in para 4 cannot have the effect of validly increasing the rent 'commencing from 1 April 1993' or at all. That the plaintiff's solicitors must have realized this can be seen from the fact that on 22 April 1993 they sent another notice which, inter alia, purported to terminate the tenancy on 31 May 1993 unless the defendant was prepared to 'continue the tenancy' at a rental of RM12,000 per month. It was contended that the defendant failed to comply with the notice of 22 April 1993 and continued to wrongfully reside in the premises. It was contended that the defendant should pay rental at RM12,000 per month 'commencing from 1 April 1993 or alternatively ... from 1 June 1993'.

It is against this background of what is contended in the statement of claim and what is prayed for therein that the amount that the plaintiff had caused to be entered by way of default judgment against the defendant vis-à-vis damages, has to be examined. The paragraph pertaining to damages in the default judgment is as follows:

> *Dan juga dihakimi* bahawa defendan membayar kepada plaintif ganti rugi bagi kepenghunian menyalahi undang-undang (unlawful occupation) pada kadar RM15,000 sebulan mulai 1 Jun 1993 sehingga penyerahan pemilikan diberi kepada plaintif.

ie 'damages for unlawful occupation in the sum of RM15,000 from 1 June 1993 until vacant possession'.

Now, in the first place, O 19 r 3 provides that where the plaintiff's claim is for unliquidated damages only, on default the plaintiff is entitled to enter interlocutory judgment for damages to be assessed.

And the words 'debt or liquidated demand' do not extend to unliquidated damages whether in tort or in contract even though the amount of such damages be named at a definite figure — *Knight v Abbot Page & Co* (1882) 10 QBD 11 cited in the *1973 White Book* para 6/2/4 at p 38.

Worse, in the instant case, as has been seen in the statement of claim, the plaintiff was uncertain at what rate and from which date damages are to be computed. The statement of claim seeks for it to be computed at RM12,000 per month *either* from 1 April 1993 *or* from 1 June 1993 and at RM15,000 *only from 1 October 1993* 'until *a date to be fixed* by the court'. Clearly what was envisaged and what should have been done was to have the damages assessed and it is trite that in assessing it, the court would have awarded damages actually suffered but at not more than the amount claimed, RM12,000 until 30 September 1993 and RM15,000 from 1 October 1993.

Accordingly, to enter a definite amount by way of damages without having it assessed is bad enough but to have the registrar enter judgment at RM15,000 a month from 1 June 1993 when there is no nexus between that amount and that date is highly questionable to say the least.

Not only must care be taken not to sign default judgment before due time (if any) has expired (or the defendant will be entitled ex debito justitiae to have it set aside — *Anlaby v Praetorius* (1888) 20 QBD 764) but care must also be taken to enter default judgment only for the amount actually due at the time when judgment is entered as otherwise the defendant is equally entitled ex debito justitiae to have it set aside — *Hughes v Justin* [1894] 1 QB 667, CA.

Since completing this judgment in draft, I have had the opportunity of reading the draft judgments herein of my brothers Shaik Daud and Gopal Sri Ram JJCA who, though arriving at the destination which in the conclusion to be arrived at in this appeal, have travelled in some areas paths somewhat different to the paths taken by me, have been moving in the same direction taken by me to arrive at the identical conclusion, substantially for the same reasons, that this appeal should be allowed. I fully agree with the orders that my Lord Shaik Daud JCA proposes should be made in this appeal.

Order accordingly.

Reported by Anne Khoo